Supreme Court, U.S.
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No. 95-419

In The

# Supreme Court of the United States

October Term, 1995

EDDIE L. TAYLOR,

*Petitioner,*

vs.

THE GOODYEAR TIRE & RUBBER COMPANY,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## LIST OF PARTIES

The parties before the Sixth Circuit Court of Appeals and this Court are Petitioner, Eddie L. Taylor, and Respondent, The Goodyear Tire & Rubber Company.

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Respondent respectfully requests this Court to deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unreported. The opinion of the United States District Court for the Northern District of Ohio is also unreported. Both are included in the Appendix to the Petition for a Writ of Certiorari filed by the Petitioner.

## STATUTORY PROVISIONS INVOLVED

Employee Retirement Income Security Act of 1974, § 510, 29 U.S.C. § 1140.

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . .

Ohio Revised Code § 2305.09 Four years; certain torts.

> An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, 2305.14 and 1304.35 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

## STATEMENT OF THE CASE

Petitioner filed a Complaint against Respondent, The Goodyear Tire & Rubber Company ("Goodyear"), on September 4, 1992, (Respondent's Appendix A) alleging a violation of § 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1140. (Appendix A, ¶¶1, 17) Petitioner alleged that he was employed by Respondent Goodyear in various capacities, including as a tire builder, from June 27, 1968 until January 23, 1980. (Appendix A, ¶4) Petitioner alleged that, during some unspecified period of time, he was on layoff status, was incarcerated in the Ohio penal system, and contracted a mental illness. (Appendix A, ¶5) Petitioner alleged that despite giving notice to a member of Goodyear's management that he was incarcerated and was suffering from a mental illness, Goodyear sent Petitioner a recall letter on

September 30, 1983 requesting that he return to work. (Appendix A, ¶¶6, 7 and 8)

Petitioner alleged that he could not respond to Goodyear's recall letter because he was incarcerated and, due to his inability to report for work, his employment status was terminated. (Appendix A, ¶9) According to Petitioner's Complaint, he was released from prison in April, 1985, at which time he requested that "Goodyear retroactively classify him as on a sick leave of absence during his incarceration period." (Appendix A, ¶10) Petitioner alleged that Goodyear refused to comply with his request to be classified on sick leave while in prison. (*Id.*)

Petitioner further alleged in his Complaint that Goodyear maintained a health insurance and hospitalization plan that would have paid medical expenses arising out of his mental illness, and that Goodyear also maintained a retirement and pension plan in which Petitioner was entitled to participate. (Appendix A, ¶¶11 and 12) Petitioner alleged that when Goodyear discharged him, refused to recall him, and/or placed him on a recall list after he completed his incarceration, Goodyear allegedly acted with the intent to interfere with Petitioner's "attainment of benefits under an employee benefit plan and in discrimination of Plaintiff's future participation in the plan because of his mental illness." (Appendix A, ¶16) Petitioner also alleges that these actions were "in violation and a breach of a collective bargaining agreement Goodyear is a party to." (*Id.*) In his prayer for relief, Petitioner sought compensatory damages for lost earnings and benefits from April, 1985 to the present, along with reinstatement to his former position, costs, and attorneys' fees.

In its Answer, Goodyear denied that it breached any obligations to Petitioner under ERISA or under any alleged contract. Goodyear also raised the affirmative defenses that Petitioner's claims are barred by the applicable statute of limitations and that his claims are barred based on *res judicata* and collateral estoppel. Respondent Goodyear was previously granted judgment in its favor in a prior federal lawsuit between the parties arising out of an arbitration involving the same facts, which was eventually resolved on appeal to the Sixth Circuit Court of Appeals. (*See*, Appendix B)

On May 5, 1993, the District Court granted Goodyear's Motion for Judgment on the Pleadings as to Petitioner's ERISA § 510 claim. (Petitioner's Appendix E) The District Court deferred judgment on Petitioner's contract claims, and notified the parties of the conversion of Goodyear's motion for judgment on the pleadings to one for summary judgment as to Petitioner's contract claim. (*Id.*) The District Court granted both parties ten days leave to supplement their submissions on the issue of the preclusion of Petitioner's contract claims by the doctrines of *res judicata* and collateral estoppel. (*Id.*)

Having received no additional submissions from the parties, on August 19, 1993, the District Court granted summary judgment to Goodyear as to Petitioner's contract claims under the doctrines of collateral estoppel and *res judicata*. (Petitioner's Appendix D) On September 20, 1993, Petitioner filed a Notice of Appeal to the Sixth Circuit Court of Appeals. On October 17, 1994, the Sixth Circuit affirmed the decision of the District Court, finding that Petitioner's claim was barred by not only the statute

of limitations, but also by the doctrines of *res judicata* and collateral estoppel. (Petitioner's Appendix A)

## SUMMARY OF ARGUMENT

None of the grounds asserted by Petitioner present any substantial issue for review by this Court. The Court of Appeals for the Sixth Circuit properly affirmed the decision of the District Court for the Northern District of Ohio granting Respondent judgment on the pleadings as to Petitioner's claims under ERISA § 510, and the District Court's grant of summary judgment to Respondent as to Petitioner's breach of contract claims. Due to the fact that ERISA § 510 does not provide a statute of limitations for claims brought thereunder, the Sixth Circuit properly applied the four-year statute of limitations for wrongful discharge claims under Ohio law for violation of public policy. The Sixth Circuit's application of the statute of limitations for claims based on wrongful employment termination is consistent with the majority of the United States Circuit Courts which have addressed this issue.

The Sixth Circuit also properly affirmed the summary judgment for Respondent on Petitioner's breach of contract claim due to the fact that this claim was barred based on the doctrine of *res judicata* and collateral estoppel. The issue of whether or not Petitioner was properly discharged from his employment with Respondent was already arbitrated and litigated between the parties in prior proceedings.

## REASONS FOR DENYING THE PETITION

### I. THE SIXTH CIRCUIT PROPERLY APPLIED THE FOUR-YEAR STATUTE OF LIMITATIONS FOR WRONGFUL DISCHARGE CLAIMS UNDER OHIO LAW TO PETITIONER'S CLAIM UNDER ERISA § 510.

The Court should deny Petitioner's Writ of Certiorari because the Sixth Circuit properly upheld judgment for Respondent on Petitioner's ERISA § 510 claim because it was barred by the applicable Ohio statute of limitations. Section 510 does not provide a statute of limitations for claims brought under it. *See, e.g., Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1137 (7th Cir. 1992); *Felton v. Unisource Corp.*, 940 F.2d 503, 510 n.10 (9th Cir. 1991); *McClure v. Zoecon, Inc.*, 936 F.2d 777, 778 (5th Cir. 1991); and *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1241 (11th Cir. 1989). Therefore, where a federal statute provides no statute of limitations, this Court has held that "the courts must apply the most closely analogous statute of limitations under state law." *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983); *Wilson v. Garcia*, 471 U.S. 261, 266 (1985). *See, also, Gavalik v. Continental Can Co.*, 812 F.2d 834, 843 (3d Cir. 1987), *cert. denied*, 484 U.S. 979 (1987).

In its decision, the District Court canvassed the Circuit courts and found that " 'The majority of Courts of Appeals that have addressed this issue have concluded that . . . the most analogous statute of limitations for § 510 claims are based on employment discrimination and/or wrongful termination law.' " Order of May 5, 1993, (Petitioner's Appendix E, pp. 51-52) quoting *Tolle, supra*, 977 F.2d at 1137-38; *citing, Felton, supra*, 940 F.2d at 510 n.10;

and *McClure, supra,* 936 F.2d at 778-79. *See, also, Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197, 1205 (10th Cir. 1990); *Gavalik, supra,* 812 F.2d at 843; *Hinton v. Pacific Enterprises,* 5 F.3d 391, 394 (9th Cir. 1993), *cert. denied,* 114 S. Ct. 1833 (1994); *Byrd v. MacPapers, Inc.*, 961 F.2d 157, 160 (11th Cir. 1992); and *Teumer v. General Motors Corporation,* 840 F. Supp. 538, 543 (N.D. Ill. 1993).

Following the analysis of the majority of the Circuit Courts, the District Court decided that Petitioner's claim under § 510 should be compared to a wrongful discharge action in violation of Ohio public policy. Therefore, the District Court applied the four-year statute of limitations applicable to such claims set forth in Ohio Revised Code § 2305.09(D). *See, e.g., Painter v. Graley,* 84 Ohio App. 3d 65 (1992), *aff'd,* 70 Ohio St. 3d 377 (1994); and *Bojac Corp. v. Kutevac,* 64 Ohio App. 3d 368 (1990). Due to the fact that it is undisputed in this case that Petitioner's cause of action accrued in April, 1985, Petitioner's claim under ERISA § 510 filed more than seven (7) years later, in September, 1992, was, according to the District Court, untimely pursuant to the four-year statute of limitations set forth in Ohio Revised Code § 2305.09(D). The Sixth Circuit agreed that Petitioner's claim under ERISA § 510 was barred by the applicable four-year statute of limitations.

In his petition, Petitioner argues that Ohio's fifteen-year statute of limitations, found in Ohio Revised Code § 2305.06, for breach of a written agreement, should be applied to his claims in this case. In his petition, Petitioner erroneously analogizes his § 510 claim to different sections of ERISA which have different purposes and limitations periods. For example, Petitioner improperly

relies on *Dennis v. Sawbrook Steel Castings Co.*, 792 F. Supp. 552 (S.D. Ohio 1991), in support of his claim that a fifteen-year statute of limitations should be applied. However, *Dennis* involved a plaintiff's claim for breach of a written pension plan under ERISA § 502, 29 U.S.C. § 1132, while Petitioner has brought his claim in this case under ERISA § 510, 29 U.S.C. § 1140, for retaliation and interference with attainment of benefit rights, *not* for breach of a pension plan under § 502. In paragraphs 1 and 17 of his Complaint, Petitioner explicitly states that his claims are being brought pursuant to 29 U.S.C. § 1140 (ERISA § 510). Petitioner's only reference to a breach of contract in his Complaint appears in the following context in Paragraph No. 16 of his Complaint:

> 16. The action of Goodyear in *discharging* Plaintiff, refusing to recall and/or placing Plaintiff on its recall list after completing his incarceration was for the purpose of *interfering* with Plaintiff's attainment of benefits under an employee benefit plan and in *discrimination* of Plaintiff's future participation in the plan because of his mental illness. *Said actions* are also in violation and a breach of a *collective bargaining agreement* Goodyear is a party to. [Emphasis added]

Thus, in Paragraph No. 16 of his Complaint, it is clear that Petitioner is claiming that Goodyear interfered with his ability to obtain benefits, and that it violated the collective bargaining agreement, not that Goodyear violated the terms of any written benefit plan. Petitioner did not append to his Complaint the benefit plan, or the collective bargaining agreement, nor did he describe the

provisions therein which were allegedly violated. Obviously, Petitioner's interference and discharge claims are directly within the scope of ERISA § 510.

In his petition, Petitioner also relies on a decision by the Eighth Circuit in *Heideman v. PFL, Inc.*, 904 F.2d 1262 (8th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991), in which the Eighth Circuit applied a Missouri state contract statute of limitations to an ERISA § 510 claim. The Court in *Heideman*, however, did not distinguish the opposite approaches by the Ninth, Third, and Eleventh Circuit Courts in *Felton v. Unisource Corp.*, 940 F.2d 503 (9th Cir. 1991); *Gavalik v. Continental Can Company*, 812 F.2d 834 (3rd Cir. 1987), *cert. denied*, 484 U.S. 979 (1987); and *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989), respectively, and *Heideman* was decided before *Felton* and *Hinton, supra*. The Eighth Circuit appears to be the only Circuit applying a state contract statute of limitations to an ERISA § 510 claim.

In his brief, Petitioner also relies upon *Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210 (6th Cir. 1987), *cert. denied*, 484 U.S. 820 (1987), in support of his allegation that Ohio's fifteen-year statute of limitations for written contract claims should be applied to his claim. However, *Apponi* was not decided under ERISA, and the claim in *Apponi* did not, unlike the instant case, involve claims of retaliation or discharge from employment.

Finally, Petitioner argues in his petition that any statute of limitations applicable to his ERISA § 510 claim should have been tolled because of Petitioner's mental disability. However, Petitioner never raised this tolling

argument with either the District Court or the Sixth Circuit. Therefore, Petitioner is barred from raising this argument for this first time on appeal to this Court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); and *Walters v. First Tennessee Bank, N.A. Memphis*, 855 F.2d 267, 271 (6th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989). Further, it is absurd to argue that Petitioner's claims should have been tolled because of his alleged mental illness when Petitioner, by his own allegations, immediately began asserting his rights following his release from prison in 1985. (*See*, Appendix A, 10; and Appendix B) Despite his alleged mental incapacity, Petitioner apparently did have the wherewithal to file a lawsuit against Goodyear in district court in September, 1986, at which time his ERISA § 510 claim was still timely and could or should have been asserted, if at all. (*See*, Appendix B)

For the foregoing reasons, Appellee respectfully requests this Court to affirm the district court's finding that Petitioner's ERISA § 510 claims were barred by the applicable four year statute of limitations under Ohio law.

## II. THE SIXTH CIRCUIT PROPERLY UPHELD SUMMARY JUDGMENT FOR RESPONDENT AS TO PETITIONER'S CLAIM FOR A BREACH OF THE COLLECTIVE BARGAINING AGREEMENT BASED ON THE DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL.

The Sixth Circuit properly upheld the District Court's grant of summary judgment to Respondent on Petitioner's breach of contract claims based on the doctrines of *res judicata* and collateral estoppel because the parties

previously submitted the identical facts and issues in this lawsuit to binding arbitration. An arbitration award in favor of Goodyear was delivered on April 14, 1986, and Petitioner sought review of the arbitration decision in the District Court. *See, Taylor v. The Goodyear Tire & Rubber Co.*, No. 91-3812, slip op. at 2 (6th Cir. March 23, 1992) (per curiam), which disposed of Petitioner's appeal of the arbitration decision. (Respondent's Appendix B). Petitioner's appeal of the arbitration was dismissed by the District Court, and, on March 23, 1992, the Sixth Circuit affirmed the District Court's dismissal. (*Id.*)

Upon reviewing the prior decisions of the District Court and the Sixth Circuit in prior litigation between the parties, the District Court in the instant case properly determined that:

> On the basis of Plaintiff's prior litigation, the Court must conclude that the Defendant's violation of the collective bargaining agreement has already been litigated – leading, no doubt, to collateral estoppel on that point. Regardless of this conclusion, however, it is clear that Plaintiff's prior arbitration and appeal addressed the very claims made here, barring this suit under the doctrine of *res judicata*.

(Petitioner's Appendix D, p. 42) The issue as to whether or not Respondent Goodyear breached the collective bargaining agreement applicable to Petitioner was the identical issue addressed by the arbitrator, and it was the identical subject of the prior litigation in the District Court, which was affirmed by the Sixth Circuit on March 23, 1992. Therefore, those prior decisions bar the instant suit not only under the doctrine of collateral estoppel, but

also clearly under the doctrine of *res judicata*. This Court has described the doctrines of *res judicata* and collateral estoppel as follows:

> Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.
>
> * * *
>
> Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties.

*Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466-67 n.6 (1982) (citations omitted). *See, also, Benjamin v. Traffic Executive Association*, 869 F.2d 107, 113 (2d Cir. 1989); *Greenblat v. Drexel, Burnham, Lambert, Inc.*, 763 F.2d 1352, 1361 (11th Cir. 1985); *Sanders v. Washington Metropolitan Transit Authority*, 819 F.2d 1151, 1157-58 (D.C. Cir. 1987); and *Schattner v. Girard, Inc.*, 668 F.2d 1366, 1371 (D.C. Cir. 1981). Therefore, any claim Petitioner may have for breach of the collective bargaining agreement is clearly barred by the doctrine of *res judicata* because the identical factual and legal issues were addressed in Plaintiff's prior arbitration and lawsuit.

Petitioner's claim is also barred based on the doctrine of *res judicata* because, pursuant to Rule 18 of the Federal Rules of Civil Procedure, Petitioner could have, but did not, join his claim for violation of ERISA § 510 at the time he filed his lawsuit in September, 1986. *See, Kremer, supra*, 456 U.S. at 466-67.

Finally, to the extent that Petitioner claims that his employment termination violated the terms of the collective bargaining agreement with his union, such a claim is preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), and is barred by its six-month statute of limitations. *See, DelCostello, supra,* 462 U.S. at 170-171. In his brief, Petitioner relies on the pre-*DelCostello* decision of this Court in *International Union, UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966), which held that a § 301 claim should be governed by a state's contract statute of limitations. However, the Court's decision in *DelCostello* in 1983 obviously overturned all prior decisions in which varying state limitations periods were applied to § 301 claims. *Id.,* 462 U.S. at 170-171.

## CONCLUSION

Petitioner has failed to show any basis for this Court to grant review. The decision of the Court of Appeals for the Sixth Circuit is consistent with applicable law, and judgment was properly entered in favor of Respondent by the courts below. Respondent therefore respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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## APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | |
|---|---|
| EDDIE TAYLOR<br>1368 Frederick Boulevard<br>Akron, Ohio 44320<br><br>Plaintiff | CASE NO. 5:92CV 1826<br><br>JUDGE DOWD |
| vs. | COMPLAINT |
| GOODYEAR TIRE AND RUBBER COMPANY<br>1144 E. Market Street<br>Akron, Ohio 44306<br><br>Defendant | JURY DEMAND ENDORSED HEREON |

### JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1337. Plaintiff's claim arises under the Employment Retirement Income Security Act of 1974; 29 U.S.C. § 1001 *et seq.* and specifically 29 U.S.C. § 1140. This Court has exclusive jurisdiction of this action by the virtue of the provisions of 29 U.S.C. § 1132(e).

### PARTIES

2. Plaintiff, Eddie Taylor, is a citizen of the State of Ohio and a resident of the City of Akron.

3. Defendant, Goodyear Tire and Rubber Company, is a corporation that does business in the state of Ohio with a place of business located at 1144 E. Market Street, Akron, Ohio 44306.

STATEMENT OF CLAIM

4. Plaintiff was employed by Defendant in various capacities including a tire builder from June 27, 1968 until January 23, 1980.

5. During the course of his lay-off, Plaintiff was incarcerated in the Ohio penal system and became afflicted with a mental illness.

6. Some time in May, 1983, Plaintiff informed John Nardella, President of United Rubber Workers No. 2, of his incarceration and asked him to pass this information on to Larry Wampler, a member of Defendant's management team.

7. Defendant was made aware that Plaintiff was incarcerated and was suffering from a mental illness.

8. Defendant sent Plaintiff a recall letter on September 30, 1983 requesting he return to work.

9. Plaintiff could not respond to Defendant's recall letter since he was incarcerated. As a result, Plaintiff was terminated by Defendant.

10. Plaintiff was released from prison in April, 1985 and requested that Defendant retroactively classify him as on a sick leave of absence during his incarceration. Defendant refused to comply with Plaintiff's request.

11. Defendant maintained health insurance and hospitalization coverage that would have paid for medical expenses arising out of Plaintiff's mental illness.

12. Defendant maintained a retirement and pension plan that Plaintiff was entitled to participate in.

13. Defendant's health insurance and retirement and pension plans constitute an "employee benefit plan" as defined in 29 U.S.C. § 1002.

14. Plaintiff was entitled to benefits under Defendant's employee benefit plans.

15. Plaintiff would have been entitled to greater retirement and pension benefits had he not been terminated by Defendant and/or recalled.

16. The action of Defendant in discharging Plaintiff, refusing to recall and/or placing Plaintiff on its recall list after completing his incarceration was for the purpose of interfering with Plaintiff's attainment of benefits under an employee benefit plan and in discrimination of Plaintiff's future participation in the plan because of his mental illness. Said actions are also in violation and a breach of a collective bargaining agreement Defendant is a party to.

17. Defendant's actions are in violation of 29 U.S.C. § 1140.

18. As a direct and proximate result of the conduct of the Defendant, Plaintiff has been deprived of his employment and all the rights and benefits to be derived therefrom.

WHEREFORE, Plaintiff prays that this Court:

(A) Award Plaintiff compensatory damages for the earnings and benefits lost by him from April, 1985 to the entry of judgment;

(B) Order the Defendant to reinstate the Plaintiff to his rightful position and retroactively restore to Plaintiff all of the benefits of his employment;

(C) Award Plaintiff costs and reasonable attorney fees; and

(D) Award any other relief that the Court may deem just and proper.

Respectfully submitted,

/s/ Robert J. Churilla

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JURY DEMAND

Plaintiff demands a trial by jury on all issues properly triable by a jury.

/s/ Robert J. Churilla

ROBERT J. CHURILLA, ESQ.
Attorney for the Plaintiff

## APPENDIX B

NO. 91-3812

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | |
|---|---|
| EDDIE TAYLOR,<br>Plaintiff-Appellant,<br>v.<br>GOODYEAR TIRE & RUBBER CO., et al.,<br>Defendants-Appellees. | ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO<br><br>NOT RECOMMENDED FOR FULL TEXT PUBLICATION |

Decided and Filed March 23, 1992

BEFORE: **GUY** and **NELSON**, Circuit Judges, and **REAVLEY**, Senior Circuit Judge.*

**PER CURIAM**. This is an action to set aside a labor arbitration award. The district court dismissed the case as untimely. Shortly before the dismissal, the plaintiff informally requested the court to set aside a second arbitration award in which the procedural validity of the first award had been sustained. In dismissing the action the court instructed the plaintiff to let his lawyer file the appropriate papers to challenge the second award. Although ample time remained for such a challenge, the time expired without the appropriate papers having been

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* The Honorable Thomas M. Reavley, United States Court of Appeals for the Fifth Circuit, sitting by designation.

filed. The plaintiff then moved for relief under Rule 60(b), Fed. R. Civ. P. The motion was denied, and the plaintiff has appealed. Finding no abuse of discretion by the district court, we shall affirm the denial of Rule 60(b) relief.

I

The plaintiff, Eddie Taylor, was laid off from his job at Goodyear Tire & Rubber Co. in early 1980. He was recalled in 1983, but did not respond to the recall notice because he was incarcerated at the time. His employment was subsequently terminated by reason of his failure to report to work.

When he was released from prison in 1985, Mr. Taylor invoked the grievance procedure of the governing collective bargaining agreement to protest his termination. He argued that Goodyear should have considered him to be on leave of absence for illness, since he was being treated for mental illness while incarcerated.

The grievance went to arbitration, and an award in favor of the defendants was delivered on April 14, 1986. The action to vacate the award was not initiated until September 3, 1986. The defendants moved to dismiss the case under 9 U.S.C. § 12, which provides as follows: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."

At Mr. Taylor's request, the district court issued an order holding the motion to dismiss in abeyance pending resolution of further arbitration proceedings. It turned

out that the further proceedings involved a second grievance in which it was asserted that the arbitral award was invalid because, contrary to the terms of the collective bargaining agreement, it was not issued within 30 days of the hearing. A second arbitration was held in November to determine whether the decision rendered in the first arbitration was valid despite having been issued late. The merits of the first grievance were not reheard at the second arbitration.

The validity of the first award was upheld in an arbitral award issued on December 1, 1986. On December 15, Mr. Taylor filed a motion pro se asking the district court to set aside the second award. The December 15 motion was not served on the defendants or their attorneys. On December 24 the district court granted the defendants' pending motion to dismiss, finding that the complaint was not timely under 9 U.S.C. § 12. The complaint dealt only with the first arbitration award, of course, and the district court's entry of dismissal noted that "the complaint as presently filed is untimely because it seeks to vacate the award issued April 14, 1986;" the new award, as the court recognized, was simply not within the scope of the complaint. The court's entry further noted that Mr. Taylor planned to hire a lawyer; in light of this fact, Mr. Taylor was advised "that it would be in his own best interests to stop filing papers with the Court himself and allow his attorney to file the appropriate papers on his behalf."

After the district court dismissed the case, and following certain proceedings not directly relevant to the issues presented in this appeal, Mr. Taylor filed motions which the District Court construed as requests for relief

from judgment pursuant to Fed. R. Civ. P. 60(b). The motions were referred to a magistrate, who recommended that they be denied. The district court adopted the magistrate's recommendation and reiterated its conclusion that Mr. Taylor's complaint seeking to set aside the first award was time-barred. Mr. Taylor perfected a timely appeal from the denial of his Rule 60(b) motions.

II

Rule 60(b), Fed. R. Civ. P., permits a district court to relieve a party from a final judgment upon a showing of "(1) mistake, inadvertence, surprise, excusable neglect . . . or (6) any other reason justifying relief from the operation of the judgment." Appeal from a denial of relief under Rule 60(b) does not bring up the underlying judgment for review, and we review denial of a Rule 60(b) motion for abuse of discretion. *Amernational v. Action-Tungsram*, 925 F.2d 970, 975 (6th Cir. 1991).

Mr. Taylor concedes that his action to vacate the first arbitration award was barred by 9 U.S.C. § 12, but he contends that the district court erred in ignoring the December 15 motion to vacate the second award; the court, he suggests, ought sua sponte to have dealt with the December 15 motion as a motion for leave to amend the complaint. The court's failure to amend the complaint having been called to its attention in the Rule 60(b) motion, Mr. Taylor argues, it [sic] was an abuse of discretion for the Court not to reinstate the lawsuit.

We do not find the argument persuasive. Mr. Taylor had told the District Court that he planned to hire a

lawyer to handle his case for him, and the court's December 24 entry specifically instructed Mr. Taylor to allow his attorney to file the appropriate papers on his behalf. As of December 24, Mr. Taylor still had more than two months within which to make a proper challenge to the second arbitration award. Under these circumstances, we do not believe that the course taken by the district court represented an abuse of discretion. The judgment is therefore **AFFIRMED**.